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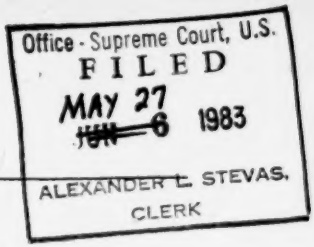

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

EDWARD J. WOODRUFF and MARY C. WOODRUFF,
Petitioners,

v.

PEGGY DOREEN ANGUS next friend of
TRACY ANGUS, SUSAN ROSE WATERS CASE
next friend of CYRUS M. WATERS,
and SITKA COMMUNITY ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

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QUESTION PRESENTED

Whether the restrictions on voluntary adoptions in the Indian Child Welfare Act of 1978, 25 U.S.C., §1913 and 1915, are an unconstitutional denial of equal protection violative of the Fifth Amendment of the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

The petitioners Edward J. Woodruff and Mary Claire Woodruff respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Oregon Court of Appeals entered in this proceeding on April 5, 1983.

OPINION BELOW

The opinion of the Oregon Court of Appeals is reported at 60 Or App 546, 655 P2d 208 (1982) and appears in the Appendix hereto. No opinion was rendered by the Oregon Supreme Court in its denial of a Petition for Review at 294 Or 569. The order denying the Petition for Review appears in the Appendix hereto.

JURISDICTION

The Oregon Supreme Court denied petitioners' timely Petition for Review on March 1, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3).

QUESTION PRESENTED

Whether the restrictions on voluntary adoptions in the Indian Child Welfare Act

of 1978, 25 U.S.C., §1913 and §1915, are an unconstitutional denial of equal protection violative of the Fifth Amendment of the United States Constitution.

STATUTORY PROVISIONS CHALLENGED

United States Code, Title 25:

Section 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term --

* * *

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of the Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

* * *

(9) "parent" means any biological parent or parents of an Indian child or Indian person who has lawfully adopted an Indian child, including adoptions under

tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

* * *

Section 1913. Parental rights, voluntary termination - Consent; record; certification matters; invalid consents

(a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

* * *

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

* * *

Section 1915 Placement of Indian children - Adoptive placements; preferences.

(a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

* * *

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

CONSTITUTIONALITY OF ACT OF CONGRESS IN ISSUE

28 U.S.C., §2403(a) may be applicable to this case in that the constitutionality of an Act of Congress of November 8, 1978, 92 Stat. 3069, 25 U.S.C. §1913 and §1915, is in issue and neither the United States nor any agency, officer or employee thereof is party. The

Solicitor General of the United States is thereby being served with this Petition.

STATEMENT OF THE CASE

The child who is the subject of this case, Matthew Woodruff, was born September 8, 1981. Three days later the birth mother, 14 year old Tracy Angus, voluntarily executed a consent that these petitioners adopt her baby. The adoptive parents immediately brought the baby home and filed an adoption proceeding pursuant to Oregon law.

The identity of the birth father was unknown to the adoptive parents. Oregon law does not require his consent to the adoption unless he has acknowledged or established paternity, or the father has supported or lived with the child. Oregon Revised Statutes, 109.070 et seq. The birth father, 14 year old Cyrus

Waters, had not complied with any of these provisions.

On March 5, 1982, six months after bringing the baby home, the adoptive parents received demand for the return of the child based on the Indian Child Welfare Act.

On April 2, 1982, the birth father, a Nez Perce Indian, acknowledged paternity.

On April 27, 1982, the birth mother became a member of the Sitka Community Association, an Indian tribe. She had been a resident of Portland, Oregon her entire life and has never been to the site of that tribe in Alaska.

On May 6, 1982, birth parents revoked consent to the adoption and filed a Writ of Habeas Corpus for the return of the child. Neither parent had ever seen the child.

A trial before the court was heard at the conclusion of which the court ordered the adoptive parents to return the child to the birth parents. That order was stayed during the pendency of the appeal to the Oregon Court of Appeals and the Petition for Review to the Oregon Supreme Court.

On March 1, 1983, the Oregon Supreme Court denied the Petition for Review. On April 14, 1983, the Sitka Community Association tribal court took jurisdiction and ordered the return of the child to the birth parents. On April 16, 1983, the adoptive parents surrendered the child and he has been in the custody of the birth parents since then.

The state Court found as facts that the birth mother was not a member of a tribe until April 27, 1982, and that the

birth father was not a "parent" under the Act until paternity was acknowledged on April 2, 1982. Therefore, under the definitions of the Act, the baby was not an "Indian child" within the purview of the Act when the child was born or when the consent was executed. The child did not come within the Act until April 2, 1982, when the father acknowledged paternity, rendering the consent which was valid at the time of the execution void.

The constitutionality of the Act was challenged as a violation of the Fifth Amendment equal protection in petitioners' initial pleading at the state trial court as an affirmative defense. The court overruled it at page 136-7 of the trial court transcript:

> "MR. GOSS: And is the Court going to make a ruling on our first affirmative defense of constitutionality.

THE COURT: You want me to take up the issue of whether or not the Indian Child Welfare Act is constitutional?

MR. GOSS: That's right your Honor.

THE COURT: I don't know that that's a defense in that sense. I think it's a legal argument. Yes, I'm satisfied that it is. I've read your memorandum and I appreciate your argument. I think probably I'm even more super-sensitive to the plight of a child who is not available for adoption under these circumstances, but I agree with the attorneys on the other side that that's an issue that has been litigated in several instances, and the law of the cases, as I've read them - I don't believe you cited any in your argument, Counsel, - but the ones I have read seem to uniformly hold that the special treatment of the Indians is not a classification in violation of the Equal Protection Law, and I'm not prepared to rule otherwise. I think the law is constitutional. If I had thought otherwise, then I would have had a different ruling."

REASONS FOR GRANTING THE WRIT

1. THE ANTI-MISCEGENATION AND RACIAL PREFERENCES CONTAINED IN THE INDIAN CHILD WELFARE ACT CONSTITUTE INVIDIOUS RACIAL DISCRIMINATION.

25 U.S.C., 1915 of the Indian Child Welfare Act, hereinafter referred to as the "ICWA", requires that, in voluntary adoptions of Indian children, preference shall be given to placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe, or (3) other Indian families. The birth parents' consent is void unless executed and recorded before a judge no sooner than eleven days after birth. The consent even if valid may be withdrawn for any reason at any time prior to entry of the adoption decree.

The Act effectively eliminates parents of another race from consideration as adoptive parents. The preference scheme leaves little chance that a non-Indian adoptive couple will have an opportunity to adopt that child. Also the risk that one of the birth parents may change his or her mind before the adoption process is completed makes an Indian child a poor candidate for placement in an non-Indian home. The clear intent of the law is to preserve the integrity of Indian tribes, a polite euphemism for preserving the racial purity of Indian blood.

There are two aspects to racial discrimination. The one most often scrutinized by this Court is unequal treatment. Almost all equal protection law has evolved around the analysis of this aspect of discrimination. The ICWA

discriminates in this way, which will be treated later. The other aspect is separation of the races, i.e., segregation or anti-miscegenation. Loving v. Virginia, 388 US 1, 87 SCt. 1817, 18 LEd.2d 1010 (1966) is the landmark case which held anti-miscegenation unconstitutional. Statutes prohibiting interracial adoptions were subsequently struck down to conform with Loving. In re Gomez, 424 SW2d 656 (Ct. Civ App, Texas, 1967). Compos v. McKeithen, 241 F. Supp. 264 (1972).

Adoptions and marriages share many of the same considerations, and the concerns raised against interracial adoptions are the same as those raised about interracial marriages. Adoption and marriage involve the choice and introduction of previously unrelated

people to form an intimate family relationship.

If the ICWA contained analogous restrictions on marriage, it would be clear that it would fail Loving. For instance, because too many Indians were marrying non-Indians and leaving the tribe, Congress enacted a waiting period before tribal members could marry. A marriage certificate must be issued by a judge only after the judge was satisfied that the Indian fiance understood the legal ramifications of marriage. An Indian must marry another Indian or lose his status as a tribal member and as an Indian under federal law.

The wording of the Virginia statutes and the Virginia court decisions upholding them cited in the Loving decision parallel the language which

support the ICWA. This Court cited the Virginia court's conclusion that Virginia's legitimate purposes were " 'to preserve the racial integrity of its citizens,' and to prevent "the obliteration of racial pride'." Loving, supra, at 7. The findings of the ICWA also are to preserve the "integrity of Indian tribes", 1901(3), and the "unique values of Indian culture", Section 1902.

Even more inherently suspect than racial discrimination is anti-miscegenation. Though many ethnic groups attempt to keep their culture thriving by self imposed isolation, the government does aid this by requiring the members to participate. When peoples voluntarily intermingle in our great melting pot, the federal government has not prevented this interbreeding. This adoption was voluntary

and the placement with this family was voluntary. There is no more justification to prevent this placement than there is to void a marriage between the parties to this case.

The other form of discrimination is unequal treatment. Here it takes the form of privileges afforded to a class of people all of whom are of the same race. The birth parents because they are members of this class are entitled to revoke their consent at any time before the adoption is final. They are also privileged in that the consent was void because it was not executed before a judge who certifies that the consent was explained in detail and fully understood. They were further privileged in that there was a ten day waiting period before a consent is valid. Such privilege extended

to one race and not to all people is sufficient to bring about the equal protection scrutiny of the Court.

However, these laws are more prejudicial than the above preferences by themselves indicate. These preferences are also turned and used against other classes. The Indian birth parents can employ them to defeat the rights of the adoptive parents of the dis-preferenced. And the rights being taken are fundamental-parental rights.

This Court has employed a different equal protection analysis to examine Congressional enactments regarding Indians, beginning with Morton v. Mancari, 417 US 535, 94 S Ct. 2474, 41 LEd.2d 290 (1974). The Court wrote that as long as the special treatment of Indians "can be tied rationally to the fulfillment of Congress'

unique obligation toward the Indians, such legislative judgments will not be disturbed." Id., at 555. The Court found that the employment preference for Indians at the Bureau of Indian Affairs was rationally designed to further Indian self-government. However, the Court cautioned that a blanket exemption for Indians from all civil service examinations is obviously a more difficult question. There is, then, a limit on the preferences Congress can extend to Indians by means of its "unique obligation." "The Unites States' fiduciary responsibility toward Indians covers lands, minerals, waters, forests, and fisheries, as well as rights to self-government." Johnson and Crystal Indians and Equal Protection, 54 WASH. L. Rev. 587, 626 (1979). The unique relationship between the federal

government and the Indians has never before dealt with adoptions. Adoption, matrimony and other aspects of the family has been peculiarly a state concern. Adoptions have no rational relationship to the federal status of Indians. "Legislation dealing with Indians as a discrete class but not reasonably related to their federal status should be tested against the stricter equal protection standards prohibiting discrimination based on race, ancestry, or national origin." F. Cohen, Cohen's Handbook of Federal Indian Law (1982) p. 657-8. That is the test of strict scrutiny. No classification based on race which has come before this Court has withstood the test of strict scrutiny.

2. THE PERMANCY OF ADOPTIONS HAS BEEN UNDERMINED BY THE INDIAN CHILD WELFARE ACT.

The Indian Child Welfare Act has brought a great cloud of doubt over many adoptions and has seriously disrupted the placement of babies without precise bloodlines.

There are so many ways that adoptions can be aborted by the Act. The birth parents can revoke their consent at any time before the adoption is final. There is no way to be certain that a baby is not subject to the Act so there is no standard to determine when the consent must be executed in court more than ten days after birth. If there is any question of the child's racial make-up, Indian families will be given preference in order to be certain that the order of preference

is followed. There are numerous common circumstances in which there would appear to be no reason to so comply with the Act: (1) the birth mother is not Indian and does not know the father is an Indian; (2) the birth mother is a member of a tribe and does not know it; (3) a birth parent is a tribal member but denies it because he/she does not want to be bothered, or more than likely, is afraid to appear before a judge. In the case at bar, two more of these traps combined to bring about this trajedy. The birth mother did not become a tribal member until eight months after the consent. The father did not become a parent, i.e., acknowledge paternity, for seven months after the consent. There was no need to run the guantlet of the Acts requirements at the time the consent was executed.

In any of the above cases, it is not necessary for the birth parents to even want to void the adoption. Tribes which has authority to determine who is a member, Santa Clara Pueblo v. Martinez, 436 US 49, 72n.32, 98 S. Ct. 1670, 56 LEd.2d 106 (1978), have intervened to void the adoption. §1914. The void consent means the child can be taken away at any time during their 18 years of minority.

These pitfalls have given adoption agencies grave concern and have forced them to investigate the bloodlines of the babies. This is very difficult to do because of the typical circumstances when the babies are placed for adoption. The result is that all but the most fair complected babies are ever harder to place. The agencies are requiring waivers of

liability from adoptive parents. Adoptive parents then decline the baby when they learn of the risk of having the baby taken from them.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Oregon Court of Appeals.

Respectfully submitted,

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May 27, 1983

Appendix.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

In the Matter of the Application of Tracy Angus and Cyrus M. Waters for a Writ of Habeas Corpus

Peggy Doreen Angus next friend of Tracy Angus and Susan Rose Waters Case next friend of Cyrus M. Waters,

Respondents,

v. No. D8204-68177
CA A25245

Thomas P. Joseph; Edward J. Woodruff and Mary C. Woodruff,

Appellants,

Sitka Community Association,

Intervenor-Respondent.

* * * * * *

Appeal from Circuit Court, Multnomah County

Kathleen B. Nachtigal, Judge.

Argued and submitted September 21, 1982.

Richard C. Goss, Portland, argued the cause and filed the brief for apellants.

R. Randy Harrison, Portland, argued the cause for respondents. With him on the brief were Craig J. Dorsay and Kent B. Thurber, Portland.

Leroy W. Wilder, Portland, argued the cause and filed the brief for intervenor.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J.

Affirmed.

FILED: DECEMBER 8, 1982

WARDEN, J.

Plaintiffs,[1] the biological parents of a one-year old child, brought this habeas corpus proceeding to obtain the release of their child from the physical custody of defendants, who in another proceeding were petitioning for adoption of the child.[2] Defendants have custody of the child pursuant to the consent of the natural

mother.[3] The basis for plaintiffs' demand for the return of their child is the Indian Child welfare Act of 1978, 25 USC §1901 et seq (Supp 1981) (hereinafter ICWA). It is undisputed that, if the ICWA applies and is constitutional, plaintiffs are entitled to return of the child.[4] The trial court granted the relief sought, the defendants appeal. We affirm.

The ICWA was passed in part because of a Congressional finding

> "that an alarming high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies * * *", 25 USC §1901(4),

and because

> "it is the policy of this nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families * * *." 25 USC §1902.

The issue at trial was whether the biological parents qualified for the protections of the ICWA.

The relevant definitions are as follows:

"* * * * *

"(4) 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

"* * * * *

"(8) 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Department of the Interior] because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

"(9) 'Parent' means any biological parent or parents of an Indian child * * *. It does not include the unwed father where paternity has not been acknowledged or established." 25 USC §1903.

Thus, a parent can qualify for protection under the ICWA if his or her child (1) is a member of an Indian tribe or (2) is merely eligible for membership in an Indian tribe and either parent (excepting unwed fathers who have not established or acknowledged paternity) is a member of an Indian tribe.[5] The parent must also prove that the Indian tribe in which he or she claims membership for either the parent or the child is recongnized as eligible for the services provided to Indians by the Department of the Interior.

In this case, both biological parents were age 14 and unwed at the time of the birth of their child. The mother consented to the adoption of her child three days after its birth. The father formally acknowledged parternity about seven months

after the birth. Both parents have signed a revocation of the conset to adoption. The father claims membership in the Nez Perce tribe; the mother in the Sitka Community Association. Defendants assign as error the trial court's (1) failure to grant defendants' motion to dismiss made at the close of plaintiffs' case, (2) allowance of plaintiffs' motion to reopen their case after both parties had rested, (3) decision in favor of plaintiffs and (4) holding that the ICWA is constitutional.[6]

Defendants first contend that the trial court erred in not granting their motion to dismiss. Mistakenly denominated a motion for a directed verdict, the motion came after plaintiffs had rested their case and after defendants had reserved putting on their case until additional pleadings were

received. After the trial judge denied the motion, she allowed plaintiffs' motion to reopen their case. Treating defendants' motion as a motion to dismiss under ORCP 54B(2), we find no error. The standard for that motion is that, if the plaintiff has introduced credible evidence on the essential elements of the cause of action, the trial judge having the discretion to discount impeachment evidence, the motion should be denied. Castro and Castro, 51 Or App 707, 713, 626 P2d 950 (1981).

However, because of the decision of the trial judge to allow plaintiffs to reopen their case, which is also assigned as error and discussed below, we need not judge the sufficiency of plaintiffs' evidence at the time of the motion to dismiss under the Castro test. A denial of a motion for

involuntary dismissal under ORCP 54B(2) is only a tenative and inconclusive ruling on the quantum of plaintiffs' proof. The rule states that, instead of dismissing, the court "may decline to render any judgment until the close of all the evidence," and a denial of the motion has the same effect. If plaintiffs' quantum of proof when they first rested failed to meet the Castro standard, the failure was cured after plaintiffs submitted additional evidence.[7]

Defendants next assign as error the granting of plaintiffs' motion to reopen their case.

> "It is well established that the reopening of a case at any time for the introduction of additional evidence rests in the sound discretion of the trial court, the exercise of which will not be disturbed unless a manifest abuse has occurred." Abrogast v. Pilot Rock Lumber Co., 215 Or 579, 595, 336 P2d 329 (1959)

An abuse of discretion has been defined in another context as "arbitrary or oppressive" action. State v. Lewis, 113 Or 359, 364, 230 P 543 (1924), reh den 113 Or 370, 232 P 1013 (1925). Defendants cite no case in which a decision allowing a motion to reopen was held to be reversible error and we find no abuse of discretion here. The trial judge stated that her reason for allowing the motion was that the case involved custody of a child. A case in which the interests of a child are at stake is a particularly inappropriate place in which to apply a "sporting theory" of justice. We also agree with plaintiffs that the broad remedial purposes of the ICWA supports the trial court's decision to grant the motion.

Defendants next assign as error the trial court's decision on the merits. Because this was a trial to the court, our scope of review would normally be limited to whether, considering the evidence in the light most favorable to the prevailing party, there was substantial evidence to support the trial court's findings. White v. Bello, 276 Or 931, 933, 556 P2d 1362 (1976).[8] We recognize that application of the ICWA may result in disruption of a bond formed between the child and the adoptive parents. The essential determinations to be made here also involve mixed questions of fact and law, e.g., membership in an Indian tribe. Nonetheless this is a law action, and we review it as a law action. With respect to the factual side of our review.

we find that there was substantial evidence to uphold each of the trial court's findings.

The trial judge made the following findings of fact:

"1. TRACY ANGUS and CYRUS M. WATERS are the biological parents of Baby Boy Angus, born September 8, 1981;

"2. CYRUS M. WATERS has acknowledged and established paternity as of April 2, 1982;

"3. CYRUS M. WATERS is and has continuously been an enrolled member of the Nez Perce Indian Tribe since at least September 12, 1978;

"4 TRACY ANGUS is an Alaska Native and has been an enrolled member in the Sitka Community Association since April 27, 1982. She was not an enrolled member, although she was eligible for enrollment, at the time of the birth of the child;

"5. The Nez Perce Tribe is a federally recognized Indian tribe within the meaning of the Indian Child Welfare Act (ICWA);

"6. The Sitka Community Association is a federally recognized Indian tribe within the meaning of the ICWA;

"7. Baby Boy Angus is an enrolled member of the Sitka Community Association and would be eligible for membership in the Nez Perce Tribe, should his enrolled status with the Sitka Community Association ever terminate;

"8. CYRUS M. WATERS never consented to the adoption of Baby Boy Angus;

"9. TRACY ANGUS consented to the adoption of Baby Boy Angus on September 10, 1981, three (3) days after birth, in Emanuel Hospital before two (2) lay-witnesses;

"10. TRACY ANGUS has formally revoked and withdrawn consent to the adoptive placement of Baby Boy Angus."

We point out one general consideration: the ICWA itself contains no definition of membership in an Indian tribe. In the absence of a Congressional definition, and Indian tribe has authority to determine its own membership. Santa Clara Pueblo v. Martinez, 436 US 49, 72 n 32, 98 S Ct 1670,

56 L Ed 2d 106 (1978); see F. Cohen, Handbook of Federal Indian Law 20-23 (1982). Formal membership requirements differ from tribe to tribe, as do each tribe's method of keeping track of its own membership. There is thus no one method of proof of membership, but the testimony of a representative of tribal government would be probative evidence of membership.

Plaintiffs offered the following evidence. An enrollment officer of the Sitka Community Association testified that she approves enrollment applications and certifies enrollment in the tribe. She stated that as of April 17, 1982, both the natural mother and the child were duly enrolled members in the tribe. Enrollment forms support this testimony. The natural mother testified that both she and her

child were enrolled members of the Sitka Community Association. A letter dated April 15, 1981, from the Acting Deputy Commissioner of Indian Affairs, was admitted into evidence. It states:

> "Please be advised that the Sitka Community Association, organized pursuant to the Indian Reorganization Act of 1934, as amended, constitutes a tribe within the meaning of federal law." [9]

The Chief of Tribal Government Services of the Portland branch office of the Bureau of Indian Affairs (BIA), whose responsibilities include being aware of what tribes are federally recognized, also testified tha the Sitka Community Association is a federally recognized tribe.

The natural father testified that he is an enrolled member of the Nez Perce tribe. The Nez Perce tribe is included on a BIA

list of federally recognized tribes that was admitted in evidence.[10] A 14-year employe of the Nez Perce tribe testified that she was familiar with the enrollment requirements of the tribe, that the natural father is a member of the tribe and that a child of the father would be eligible for membership.[11] A copy of a printout of a portion of a membership roll of the Nez Perce kept by the BIA was submitted into evidence. "Cyrus Michael Watters" [sic] is included on the list.[12] In sum, the plaintiffs' evidence amply supported the trial judge's findings of fact.

We address finally defendants' contention that the ICWA is unconstitutional as a denial of equal protection under the fifth amendment of the United States Constitution. See Bolling v. Sharpe, 347

US 497, 74 S Ct 693, 98 L Ed 2d 884 (1954). The United States Supreme Court has consistently rejected claims that laws that treat Indians as a distinct class violate equal protection. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 US 463, 99 S Ct 740, 58 L Ed 2d 740 (1979); Delaware Tribal Business Committee v. Weeks, 430 US 73, 97 S Ct 911, 51 L Ed 2d 173 (1977); United States v. Antelope, 430 US 641, 97 S Ct 1395, 51 L Ed 2d 701 (1977); Fisher v. District Court, 424 US 382, 96 S Ct 943, 47 L Ed 2d 106 (1976); Morton v. Mancari, 471 US 535, 94 S Ct 2474, 41 L Ed 2d 290 (1974). Traditional equal protection analysis cannot be applied.

In Morton v. Mancarai, supra, the court stated:

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 USC) would be effectively erased and the solemn commitment of the Government toward Indians would be jeopardized." 417 US at 552.

Upholding a law granting Indians a hiring preference at the BIA, the court stated, "The preference, as applied is granted to Indians not as a discrete recial group, but, rather, as members of quasi-sovereign tribal entities * * *." 417 US at 554. The same is true of the ICWA, which nowhere requires any specific quantum of Indian blood for a person to come under its protection. We therefore apply the Morton v. Mancari test:

> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 US at 555.

The court upheld the Indian hiring preference law, because "the preference is reasonable and rationally designed to further Indian self government * * *." [13] The goal of the ICWA is to protect Indian families against disruption, pursuant to a Congressional finding that an alarmingly high percentage of Indian families are broken up by unwarranted removal of Indian children from them and that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children * * *." 25 USC §1901(3), (4). We hold the protection of the integrity of Indian families to be a permissible goal that is reationally tied

to the fulfillment of Congress' unique guardianship obligation toward the Indians and that the ICWA is therefore not unconstitutional.[14]

Affirmed.

FOOTNOTES

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[1] To avoid confusion, we will call the natural parents "plaintiffs" and the prospective adoptive parents "defendants," even though they denominated themselves as "petitioners" and "respondents." below.

[2] At the conclusion of the habeas corpus proceeding, the court dismissed the adoption petition.

[3] The natural father did not consent to the adoption of the child. Neither party raised the issue at trial of the father's possible rights and remedies under state law, and we do not discuss it.

[4] The ICWA requires that, when an Indian child is removed from his biological parent for any foster care placement where the parent cannot have the child returned upon demand, consent to the placement is invalid if given before, or within 10 days after, the birth of the child and it must be given before a judge who certifies that the parent understands the consequences of the consent. 25 USC §1903(1)(i), 1913(a). Neither requirement was met here. The ICWA also provides that the parent of an Indian child may revoke consent at any time before entry of a final decree of adoption and have the child returned. 25 USC §1913(c).

5

Defendants are wrong when they state, "The natural parents must prove that one of them is a member of a recognized Indian tribe and that the child is a member or eligible for membership in that same tribe." (Emphasis supplied.)

6

Defendants also assign as error the admission over their objection of certain documents and testimony. Because we find there was substantial evidence to uphold the trial judge's findings of fact even without consideration of the evidence objected to, we need not discuss these assignments of error. See OEC 103(1); or Const, Art VII (Amended), §3.

7

As a part of the same assignment of error, defendants claim that plaintiffs' case should have been dismissed because of plaintiffs' failure to file a replication. Plaintiffs did not file a replication until eight days after the first day of trial. Normally, the defendants' return is treated as the initial pleading in a habeas corpus proceeding, with the plaintiffs' replication serving as the answer. However, ORS 34.670 states that "[t]he plaintiff in the proceeding, on the return of the writ, may, by replication, signed as in an action, controvert any of the material facts set forth in the return * * *" (emphasis supplied.); and ORS 34.680 states in part, "The pleadings * * * shall be construed and have the same effect as in an action." ORCP 12B states, "The court shall, in every stage of an action, disregard any error or defect in the

pleadings or proceedings which does not affect the substantial rights of the adverse party." Here, no matters were raised at the trial of which defendants were not already informed by way of plaintiffs' petition for the writ, which was served on defendants. We find no error.

8
Appeal from a final judgment in a habeas corpus proceeding is brought "in like manner and with like effect as in an action." ORS 34.710.

9
Defendants attempt to refute this evidence by pointing to the list published by the Bureau of Indian Affairs (BIA) in the Federal Register on July 8, 1981, pursuant to 25 CFR 54.6(b), of "the tribal entities that have a government-to-government relationship with the United States," acknowledging "their eligibility for programs administered by the Bureau of Indian Affairs" put in evidence by plaintiffs. The Sitka Community Association is not listed, but nothing about the document indicates that is is meant as an exclusive listing. The letter from the Acting Deputy Commissioner states that the Sitka Community Association "will be included on the list in the Federal Register when that list is published." The regulations governing the Federal Register list confine the definition of "Indian tribe" to Indian groups "within the continental United States," 25 C.F.R. § 54.1(f) (1981), and do not apply to tribes "which are already acknowledged as such,"

25 CFR §54.3(b) (1981). The list relied on by defendants contains no Alaskan tribe.

10 See n 10, supra. [sic]

11 Defendants objected to this testimony at trial and assign its admission as error. The basis for objection is that it was an opinion "phrased in terms of inadequately explored legal criteria" under OEC 704, and that because the eligibility requirements were contained in the tribal constitution, which was not in evidence, the testimony was inadmissible under the best evidence rule, OEC 1002. The eligibility requirements of the tribe were never in issue; the tribal employe testified only that the father met those requirements, about which the employe had personal knowledge and the tribal constitution said nothing. Her conclusion as to the father's membership was not objectionable as embracing an ultimate issue of fact. OEC 704. If the witness lacked a basis in personal observation for her statement, this was a matter that defendants could expose on cross-examination, but we find no basis on which to reverse the trial court's determination that the witnesses' opinions were "helpful to a * * * determination of a fact in issue," which is the standard for lay opinion testimony under ORC 701.

[12] Defendants objected to this evidence below and assign its admission as error on appeal, on the ground that a membership roll kept by the tribe was the "best evidence" of tribal membership. Defendants' objection based on the rule reflects a common misunderstanding of the best evidence rule, which applies only when the actual terms or conditions of a document are in issue and are attempted to be proved. See Comment to OEC 1002 and n 12, supra. The contents of the tribal membership roll were not an issue here, only membership itself.

[13] Defendants argue that, because the ICWA is not related to Indian self-government, it fails the Mancari test. This misrepresents Mancari's holding. The futherance of Indian self-government was only an example of a goal that is "tied rationally to the fulfillment of Congress' unique obligation toward Indians * * *"; it is not the only permissible goal.

[14] Because the ICWA does not absolutely prohibit adoption of Indian children by non-Indians, but only institutes procedrual protections for the Indian parents, we need not discuss defendants' arguments under Loving v. Virginia, 388 US 1, 87 S Ct 1817, 18 L Ed 2d 1010 (1967), whichstruck down Virginia's anti-miscegenation law.

COSTS SHEET

Case Name: Angus v. Joseph

Court of Appeals Case Number A25245

Trial Court or Agency Case Number D8204-68177

The prevailing parties are Respondents

[ ] No costs are awarded

[X] Costs are awarded to the prevailing parties.

The parties responsible for paying costs are appellants

****

The following entries will be made as appropriate at the time that the appellate court decision is enforceable. Attorneys see Rules 11.03, 11.05 and 11.10.

It is therefore ordered that respondents Angus et al recover from appellants costs and disbursements on appeal taxed at $276.50 and that respondent Sitka Community Association recovers from appellants costs and disbursements on appeal taxed at $134.

The Supreme Court denied petition for review on March 1, 1983.

Date appellate court decision is enforceable: April 5, 1983.

SUPREME COURT COURT OF APPEALS

March 1, 1983

Mr. Richard C. Goss
Attorney at Law,
440 American Bank Building,
Portland, Oregon 97205

Re: Angus v. Joseph - CA A25245
SC 29206

Dear Mr. Goss:

The Supreme Court has today denied Appellant's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

/s/ Marilyn Hartley
Supreme Court Calendar Clerk

MH/st
cc: Mr. Leroy W. Wilder
Mr. R. Randy Harrison
Mr. Kent B. Thurber

Office
JUL 1 1983
ALEXANDER L. STEVAS,
CLERK

82-2144
NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

EDWARD J. WOODRUFF and MARY C. WOODRUFF,
Petitioners,

v.

PEGGY DOREEN ANGUS next friend of
TRACY ANGUS, SUSAN ROSE WATERS CASE
next friend of CYRUS M. WATERS,
and SITKA COMMUNITY ASSOCIATION,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

RESPONDENTS TRACY ANGUS and CYRUS WATERS' BRIEF IN OPPOSITION

SANDE SCHMIDT
KENT B. THURBER
Native American Program, Oregon Legal
Services Corporation
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Attorneys for Respondents
Tracy Angus and Cyrus Waters

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO.

EDWARD J. WOODRUFF and MARY C. WOODRUFF,
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v.

PEGGY DOREEN ANGUS next friend of
TRACY ANGUS, SUSAN ROSE WATERS CASE
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Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

RESPONDENTS TRACY ANGUS and CYRUS WATERS' BRIEF IN OPPOSITION

Respondents Tracy Angus and Cyrus Waters respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Oregon Court of Appeals Decision.

RESPONDENTS' STATEMENT OF THE CASE

In September 1981, the mother of the child who is the subject of this litigation signed a consent to place her son for adoption. In the litigation that followed this consent was found to be invalid under the Indian Child Welfare Act and the Oregon courts ordered that this child be returned to his natural parents.

About ten days before petitioners were required to return the child under the courts' orders, they succeeded in persuading the State of Oregon to file a petition in Multnomah County Juvenile Court seeking to have the child made a ward of the court and placed in their custody. This was a new legal proceeding separate from the habeas corpus proceeding. The juvenile court transferred this proceeding to the Sitka Community Association tribal court. (Appendix 1). Petitioners did not appeal this state court order and

it is now final.

A hearing was held in tribal court on April 14, 1983. The child's parents, the Tribe, and the petitioners all participated and presented evidence on the issues of wardship and placement. The tribal court ordered that the child be made a ward of that court and placed in the custody of his parents. (Appendix 2). Petitioners did not appeal this tribal court order and it is final.

REASONS FOR DENYING THE WRIT

I. THE OREGON COURT OF APPEALS CORRECTLY DECIDED THE CONSTITUTIONALITY OF THE INDIAN CHILD WELFARE ACT IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT.

Congress has plenary power over Indian affairs and a long unbroken line of Supreme Court cases has recognized and upheld this power. Morton v. Mancari, 417 U.S. 535 (1974); Board of County Comm'rs v. Seber, 318 U.S. 705 (1943); U.S. v. Kagama, 118 U.S. 375 (1886);

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

Decisions of this Court have clearly held that federal legislation on behalf of Indian tribes does not violate the fifth amendment. United States v. Antelope, 430 U.S. 641 (1977); Fisher v. District Court, 424 U.S. 382 (1976). Such federal legislation derives from the unique status of Indian tribes as a separate people with their own sovereign governments. Federal legislation pertaining to Indians is not based upon an impermissible racial classification but upon their political status as members of an Indian tribe; it is a political classification, not a racial one. E.g., United States v. Antelope, 430 U.S. 641 (1977); Fisher v. District Court, 424 U.S. 382 (1976); Morton v. Mancari, 417 U.S. 535 (1974).

The standard for judicial review of federal legislation singling out Indians

is that the legislation will be upheld if it can be tied rationally to the fulfillment of Congress' unique obligation to Indians. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); Morton v. Mancari, 417 U.S. 535 (1974). No federal statute has ever been overturned under this standard. See, F. Cohen, Handbook of Federal Indian Law 657 (1982 ed.); Johnson & Crystal, Indians and Equal Protection, 54 Wash. L. Rev. 587 (1979). When federal legislation on behalf of Indians is reasonably and rationally designed to further tribal self-government, it does not violate due process. Morton v. Mancari, 417 U.S. 535, 555 (1974).

Congress clearly had the power and responsibility to enact the Indian Child Welfare Act of 1978. As Congress stated in the Act itself, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than

their children and that the United States has a direct interest, as trustee, in protecting Indian children." 25 USC § 1901(3). Few issues are as crucial to the furtherance and protection of tribal culture and self-government as determining how and by whom future members of the tribe will be reared. See, e.g., Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 1st Sess. (1977).

The Oregon Court of Appeals correctly applied the prior decisions of this Court and found this Act to be constitutional. To reverse the Oregon Court of Appeals, this Court would have to create an exception to the prior clear and uniform law on the due process standards of judicial review of federal Indian legislation. Petitioners' challenge to this Act is without merit.

II. THE OREGON COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE APPELLATE COURTS.

There is no present conflict in the law of state courts needing resolution by this Court. All state appellate courts deciding the question of the constitutionality of the Indian Child Welfare Act are in accordance with the Oregon Court of Appeals that the Act is constitutional. In re Appeal of Pima County, 130 Ariz. App. 202, 635 P.2d 187 (1981), cert. denied, 455 U.S. 1007 (1982); E.A. v. Alaska, 623 P.2d 1210 (Alaska 1981); In re D.L.L. and C.L.L., 291 N.W. 2d 278 (S.D. 1980).

III. THE CONSTITUTIONAL ISSUE HAS BEEN SUPERSEDED BY SUBSEQUENT STATE AND TRIBAL FINAL COURT ORDERS THAT LEAVE NO CASE OR CONTROVERSY FOR THIS COURT TO DECIDE.

Petitioners participated in a second, separate proceeding after exhausting their state appellate remedies below.

This second proceeding resulted in final state and tribal court orders making the child subject to the exclusive jurisdiction of the tribal court. Therefore, there is no case or controversy remaining for this Court to decide. Any decision this Court makes will not alter the present situation or the status of the child as a ward of the tribal court. Even if this Court were to reverse the Oregon Court of Appeals, the state court would no longer have jurisdiction over this child. 1/ Therefore, any opinion this Court renders would be merely advisory.

1/ Under pre-ICWA Oregon case law, the tribal court order would be honored under principles of comity. Red Fox v. Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975). Other pre-ICWA cases also recognize the exclusive subject matter jurisdiction of tribal courts. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (1973); Wakefield v. Little Light, 276 Md. 333 (1975). See, Fisher v. District Court, 424 U.S. 382 (1976).

CONCLUSION

This Court should deny the Writ of Certiorari to review the Oregon Court of Appeals decision.

Sande Schmidt
Of Attorneys for Respondents
Tracy Angus and Cyrus Waters

June 27, 1983

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IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR MULTNOMAH COUNTY

Juvenile Department

In the Matter of	)	No. 79,711
	)	
WOODRUFF, Matthew	)	ORDER AND DISPOSITION

The above-entitled matter having come on for hearing on the 15th day of March, 1983, upon the petition of William G. Morris, dated March 9, 1983, praying that investigation be made of the circumstances concerning the above-named child; the following persons being present at the hearing:

Sande Schmidt, Attorney for Mother and Father
Edward and Mary Woodruff, Physical Custodians
John Goss, Attorney for Mr. and Mrs. Woodruff
LeRoy W. Wilder, Attorney for Sitka Community Association
Mike Beaver, Children's Services Division
Jane Wiener, Deputy District Attorney
Kathleen E. Jensen, Juvenile Court Counsellor

and it appearing to the Court, and the Court finding that:

1. Due notice of this proceeding has been given to all persons interested herein, according to the statutes in such cases made.

2. The child resides in Multnomah County, and is 18 months of age.

3. The above-named child is not within the jurisdiction of the Court by

reason of the following facts:

This matter came before the Court on the petition of the child's natural parents to transfer this proceeding to the Sitka Community Association. The attorney for said tribe similarly petitioned for a transfer of the proceedings on the grounds that the Indian Child Welfare Act provides, "the Court in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent..." The Court considered legal arguements of the attornesy, the recent decision of the Court of Appeals regarding the minor, and the transcript of proceedings held earlier in 1982 before Judge Nachtigal.
The Court being fully advised in the premises:
NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED; that

1. The Court orders that the petitions of the Sitka Community Association and of the natural parents should be allowed.
2. The Court further orders that the above-entitled proceeding be transferred to the jurisdiction of the Sitka Community Association.

DATED this 15th day of March, 1983.

/s/ Mercedes F. Diez
JUDGE

9720F/MFD/KJ/rs

IN THE CHILDREN'S COURT OF THE

SITKA COMMUNITY ASSOCIATION

IN THE MATTER OF	)	NO: 100.25
	)	
LUKAS MICHAEL WATERS,	)	ORDER
	)	
a minor.	)	

THIS MATTER came before the Court on April 14, 1983. Having heard and considered the evidence and arguments presented,

IT IS HEREBY ORDERED that:

1. The Court has jurisdiction of the case;
2. Lukas Michael Waters is a ward of the Court;
3. Lukas Michael Waters be placed in the custody of his parents, Tracy Agnus and Cyrus Waters, on Saturday, April 16, 1983, at 10:00 a.m.;
4. Appropriate supportive services, if necessary, be provided to the child and his parents through

Evelyn Blanchard under the supervision and control of the Sitka Community Association; and

5. A review hearing be set within 120 days of the day of this Order to be held before Anita Jackson, judge pro tem.

DATED this 15 day of April, 1983.

/s/ Anita N. Jackson
CHILDREN'S COURT JUDGE PRO TEM

82-2144

Office - Supreme Court, U.S.
FILED
JUL 1 1983
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EDWARD J. WOODRUFF and MARY C. WOODRUFF,
Petitioners,

v.

PEGGY DOREEN ANGUS, next friend of
TRACY ANGUS, SUSAN ROSE WATERS CASE
next friend of CYRUS M. WATERS
and the SITKA COMMUNITY ASSOCIATION,
Respondents.

ON WRIT OF CERTIORARI TO
THE OREGON COURT OF APPEALS

BRIEF OF RESPONDENT, SITKA COMMUNITY ASSOCIATION, IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Attorney for Respondent
Sitka Community
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Legislative History

H.R. REP NO. 95-1386, 95th Cong., 2d Sess. 9, reprinted in [1978] U.S. Cong. Code and Ad. News 7530, 7531 ..... 7, 8

STATEMENT OF THE CASE

An invalid consent to the adoption of the child who is the subject of this proceeding was given by his mother, Tracy Angus, three days after his birth. Tracy is a member of the Sitka Community Association, a federally recognized Indian tribe. The consent was invalid under the Indian Child Welfare Act, 25 U.S.C. §1901 et seq.[1/] The father, Cyrus Waters, an enrolled member of the Nez Perce Tribe, did not sign a consent. His paternity had not been acknowledged nor established at that time and his consent was not necessary under Oregon law. Oregon Revised Statutes, 109.070 et seq.

[1/] In relevant part, Section 1913(a) of the Act provides as follows:

> Any consent given prior to, or within ten days after birth of the Indian child shall not be valid. [Emphasis added.]

In March, 1982, upon learning of the invalidity of the consent, Tracy Angus sought return of her child. The Petitioners refused. On April 2, 1982, Cyrus Waters, acknowledged paternity. On May 6, 1982, prior to the adoption becoming final, the parents formally revoked their consent and filed a Habeas Corpus proceeding demanding return of the child.

The trial court found that Tracy Angus and Cyrus Waters, and their child, were entitled to the protection of the ICWA. It found that the original consent given by Tracy Angus was invalid and ordered the child returned. The court also found that Tracy had revoked and withdrawn her consent. The court's order was stayed, pending appeal.

The trial court's decision was affirmed by the Oregon Court of Appeals. On March 1, 1983, the Oregon Supreme

Court denied a Petition for Review.

On March 9, 1983, prior to the expiration of the stay, a separate proceeding was filed in Multnomah County Circuit Court requesting the court to assume jurisdiction of the child on separate grounds. On March 15, 1983, the court transferred jurisdiction of the child to the Sitka Community Association Tribal Court upon its request. On April 14, 1983, the child was made a ward of the tribal court and ordered returned to his parents. On April 16, 1983, the child was returned.

SUMMARY OF ARGUMENT

The Indian Child Welfare Act is a lawful exercise of Congress' power in Indian affairs. It is a rational response to the legitimate objective of protecting the welfare of Indian families and tribes. It singles out Indians for special treatment based on their political status as members of quasi-sovereign tribes with a special relationship to the United States. The Act does not discriminate based on race.

Even if race is relevant, its consideration does not violate the Constitution as long as it is not used to prohibit interracial adoptions. Thus, consideration of the Indian status of a child under the ICWA does not create a constitutional issue.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT IS A VALID EXERCISE OF CONGRESSIONAL AUTHORITY.

This Court often has recognized that exercise of the broad power of Congress to pass laws for the benefit of Indians as a separate class of citizens does not violate the Constitution.[2/] Under the numerous cases upholding this principle, the Petitioners' request for review of the constitutionality of the

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2/ In Morton v. Mancari, 417 U.S. 535 (1974), in a comment regarding special Indian legislation, the Court noted that, "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552.

Indian Child Welfare Act, 25 U.S.C. §1901 et seq., is without basis.

A. The Act is Constitutional if Congress had a "Rational Basis" for Its Enactment.

The Court has established a plain, easily applied standard under which the constitutionality of Indian legislation is to be judged. In Morton v. Mancari, 417 U.S. 535 (1974), the Court held that such legislation would be upheld as long as it can be "tied rationally to the fulfillment of Congress' unique obligation toward Indians." 417 U.S. at 555; Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977). Under the foregoing standard, the Indian Child Welfare Act unquestionably is constitutional.

B. The Act is a Reasonable Response by Congress to a Recognized Crisis in Indian Family Welfare.

Through extensive hearings in the mid-1970's, Congress became aware of the extremely high rates of Indian family separations which could not be explained rationally. The magnitude of the problem was noted in the report of the House, which stated that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." H.R. REP. NO. 95-1386, 95th Cong., 2d Sess. 9, reprinted in [1978] U.S. Cong. Code & Ad. News 7530, 7531.3/

3/Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all

With the foregoing justification, Congress took reasonable steps to provide "minimum federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." Id. at 19.

II. THE INDIAN CHILD WELFARE ACT DOES NOT UNCONSTITUTIONALLY DISCRIMINATE

This Court, on several occasions and in various contexts, has addressed the argument that the exercise of congressional authority in Indian affairs results in unlawful discrimination. In each instance,

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(3/ continued)

Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. [H.R. REP. NO. 95-1386, 95th Cong. 1st Sess. 9 (1978).]

legislation which subjects Indians to separate treatment has been upheld.

A. The Indian Child Welfare Act does not Violate Equal Protection.

This Court often has noted that legislation singling out Indians for separate treatment is not directed toward a racial class but, rather, a political class. Thus, such legislation does not violate "equal protection" as long as it is rationally related to the federal government's obligation to Indians. Morton v. Mancari, 417 U.S. 535 (1974).

Petitioners apparently contend, at least in part, that the foregoing principle applies only to federal legislation directly promoting tribal self-government. That contention was rejected in United States v. Antelope, 430 U.S. 641 (1977). In the Antelope

case, the Court noted that previous rulings upholding the political v. racial distinction had involved tribal self-regulation. The legislation in question in the Antelope case, however, dealt strictly with federal regulation of individual Indians' criminal conduct, which only implicated broader Indian interests. The Court specifically held that such regulation is permissible.

> But the principles reaffirmed in Mancari [417 U.S. 535 (1974)] and Fisher [Fisher v. District Court, 424 U.S. 382 (1976)] point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians'...." [430 U.S. at 646]

The foregoing makes clear that any exercise of congressional authority over Indian affairs must be judged under the "rational basis" test set forth in the Mancari case.[4/] Application of the more strict, equal protection analysis reserved for cases involving racial discrimination is inappropriate.[5/]

[4/] This principle applies only to Indians with a political relationship with the United States, e.g. federally recognized tribes. The Indian Child Welfare Act concerns only those Indians who are members of federally recognized tribes.

[5/] Petitioners rely almost exclusively on Loving v. Virginia, 388 U.S. 1 (1966) to support their contentions. For the reason set forth above, this reliance is wholly misplaced. Furthermore, Loving can be distinguished because it involved clear "invidious racial discrimination" for which the Court could find "no legitimate overriding purpose." Id. at 11. It involved marriage which the Court held to be one of the "basic civil rights of man." Id. at 12. In their brief, Petitioners fail completely to show any interests at stake which would make the Loving case applicable here.

B. The Status of the Child as an Indian, Even if Characterized as a Racial Classification, is a Valid Consideration in Adoptions.

Even assuming the petitioners legitimately could support the argument that the Indian Child Welfare Act singles out Indians based on race, they have not shown that it would violate equal protection. The Act attempts to protect legitimate interests of the child, parents and tribe which relate to the Indian status of the child. The protection of these interests has made the adoption of Indian children by non-Indians more difficult but not prohibitive. Race is a legitimate consideration in adoption placements as long as it is not used to prohibit interracial adoptions.

A recent case, Drummond v. Fulton County Family and Children's Services, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978), specifically upheld the constitutionality of race as a consideration in adoptions. The Fifth Circuit rejected equal protection and due process challenges to a county adoption agency's refusal to permit a white couple to adopt a black child. The court stated as follows:

> ...no case has been cited to the Court suggesting that it is impermissible to consider race in adoption placement. The only cases which have addressed this problem indicate that, while the automatic use of race is banned, the use of race as one of the factors in making the ultimate decision is legitimate. [Citations omitted] [Id. at 1205]

The cases cited by Petitioners are in accord with the foregoing. For example, in Compos v. McKeithen, 342 F.

Supp. 264 (E.D. La. 1972) the court approved race as a relevant factor in an adoption. The court stated as follows:

> ...we regard the difficulties inherent in interracial adoptions as justifying consideration of race as a relevant factor in adoption, and not as justifying race as the determinative factor. [Id. at 266]

Thus, the issue of race in this adoption has relevance, if at all, only as a legitimate factor that should be considered in adoptive placements. Thus, no constitutional issue has been raised by Petitioners.

III. CONCLUSION

The Indian Child Welfare Act is a legitimate exercise of Congress' power to legislate on behalf of Indians. It singles out Indians for special treatment based on their political relationship with the United States rather than their racial status. As

such, the Act is subject to the "rational basis" test, not the "strict scrutiny" test reserved for racial classifications. Because the Act was passed in response to a demonstrated crisis in Indian family welfare, it clearly is constitutional.

Furthermore, even if the Act does distinguish Indians based on their race, the consideration of race in an adoption proceeding does not violate the principle of equal protection. The Act does not prohibit adoption of Indian children by non-Indians but merely requires that the Indian status of a

child be considered. For these reasons, no constitutional issues are at stake in this matter and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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